UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD REGION 8

FIRST STUDENT, INC.,

CASES 08-CA-062611 08-CA-064827

And

TEAMSTERS LOCAL UNION NO. 413 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

CHARGING PARTY'S OPPOSITION TO ACTING GENERAL COUNSEL'S MOTION TO REMAND CASE

The Charging Party, Teamsters Local Union No. 413, affiliated with the International Brotherhood of Teamsters (the "Charging Party" or the "Union"), submits its Opposition to Acting General Counsel's Motion to Remand the above-captioned cases to the Regional Director of Region 8 for the purposes of effectuating a unilateral settlement to which the Charging Party objects. The Union objects to the proposed unilateral settlement because it does not substantially remedy the underlying violations found by the Administrative Law Judge (ALJ) Mark Carissimi in his decision in JD-41-12 and does not effectuate the policies of the National Labor Relations Act (the "Act")

I. BACKGROUND

The Union filed unfair labor practice charges against First Student, Inc., (the "Employer" or "Respondent"), as amended, in August- October, 2011, including allegations of Section 8(a)(3) violations with respect to the discharges of Penny Ingram, Claire Houdeshelt, and Marra Eastman, the three (3) employees who had executed Union authorization cards. A consolidated Complaint issued on March 29, 2012, including 8(a)(3) allegations for the discharges of Penny

Ingram and Claire Houdeshelt. A hearing was held before ALJ Mark Carissimi on April 30 and May 1, 2, and 3, 2012.

On March 29, 2012, the Regional Director filed for 10(j) relief in the United States District Court for the Southern District of Ohio. The Federal District Court Action is still pending.

On August 10, 2012 the Judge issued his Opinion and Recommended Order finding that Ingram, a key Union supporter and organizer, had had been discharged for engaging in protected activity under Section 7 of the Act and by discriminately selecting Gary Warnick to return to layoff status from a temporary assignment because Warnick and other employees had engaged in union activity. The ALJ also found the Employer independently violated Section 8(a)(1) of the Act by (a) instructing employees to not talk to other employees about the Union or involve other employees with the Union; (b) threatening employees with loss of jobs if they become involved with the Union; and (c) instructing employees that they could not have any communication about or with the Union while they were "on the clock."

The ALJ's Recommended Order would require Respondent to cease and desist from engaging in the unfair labor practices it was found to have violated under the Act and take specific affirmative action, including (a) offer Penny Ingram full reinstatement to her former job; (b) make Ingram whole for any loss of earnings and other benefits; (c) remove from its files any reference to the unlawful discharge against her; (d) consider Warnick for future temporary assignments; and (e) make Warnick whole for any loss of earnings and other benefits. The Recommended Order provided for Respondent to post Notices stating that the National Labor Relations Board had found Respondent to be in violation of Federal labor law and notifying

employees that will offer Ingram full reinstatement, make Ingram and Warnick whole, and will not (a) instruct employees to not talk about the union or become involved in a union; (b) threaten employees with loss of jobs if they became involved with a union; (c) instruct employees that they could not have any communication about or with a union while they were "on the clock;" or (d) discharge employees or discriminately select employees for a return to layoff status from a temporary assignment, for engaging in union or other protected concerted activities.

On August 17, 2012 the Regional Office filed in the District Court of the Southern District of Ohio its Notice Of Filing The Administrative Law Judge's Decision and Request To Modify the Petition For Injunctive Relief, noting injunctive relief is appropriate due to the likelihood that "employer discrimination, particularly when directed at union activists, has a chilling effect on employee freedom of choice in that it inhibits employees' willingness to engage openly in protected union activities." The Regional Office further acknowledged that Respondent should not "continue reaping the benefits of its unlawful conduct..." and that the Respondent's unremedied unfair labor practices have "significantly eroded the ability of the Union to represent the bargaining unit employees and that further passage of time will soon make that an impossibility."

Despite having successfully prosecuted Respondent for several serious violations of Sections 8(a)(1) and (3) of the Act, in which it obtained a Recommended Order from the ALJ reinstating Ingram with back pay, and expending significant efforts to obtain Section 10(j) relief in federal court, the Regional Office agreed to Respondent's proposed settlement agreement which, by its terms, benefits Respondent in its efforts to obstruct employee free choice regarding union representation. The brokered agreement provides that Respondent will pay back pay to the

discriminates, Ingram and Warnick, and post a modified Notice to employees in exchange for waiving Ingram's right to reinstatement. The Notice in the agreement excludes the Board's finding that Respondent violated Federal labor laws, and states "Ingram has advised us that she is not interested in returning to her former position and no offer of reinstatement will be made." Finally, the agreement contains a non-admission clause.

It has been represented that the Acting General Counsel approved the settlement on September 11, 2012. Respondent executed it on September 13, 2012, and on September 19, 2012, the Charging Party objected to the agreement as outlined in its letter to the Regional Director.

On September 6, 2012, the Board extended the deadline by which the parties must submit Exceptions and Supporting Briefs to September 21, 2012, and the instant Motion to Remand the Case and subsequent Supplemental Evidence submitted by Region 8 were filed on September 20 and September 21, 2012, respectively. Neither Respondent nor the Regional Office has filed with the Board any Exceptions to the ALJ's Decision and Recommended Order.

II. ARGUMENT

. The Union submits that the settlement agreement does not reasonably remedy the serious unlawful practices of Respondent or otherwise adequately further the policies of the Act. The Charging Party acknowledges the enigmatic position it now faces because of the settlement agreement. While recognizing Ingram's interest in achieving at least some relief in the face of the economic circumstances, initially caused by the Respondent's unlawful discharge, the Charging Party duly recognizes the realistic demise of its organizing campaign and employee free choice regarding the union should the Regional Office approve the settlement agreement.

For these reasons, the Union respectfully opposes the Acting General Counsel's Motion to Remand the above-captioned case and opposes the approval of the unilateral settlement agreement in question.

The analysis outlined in *Independent Stave*, 287 NLRB 740 (1987), weighs against approval of the unilateral settlement. Under *Independent Stave*, the Board considers several factors, including 1) whether the charging party, the respondent, and the individual discriminatees have agreed to be bound, and whether the General Counsel agrees with the settlement; 2) whether the settlement is reasonable in light of the nature of the alleged violations, the risks of continued litigation and the stage of litigation; 3) whether the settlement was obtained through fraud, coercion or duress by any of the parties; and 4) whether respondent has a history of violating the Act or breaching previous settlements. *Id*, at 744.

While Ingram and Warnick allegedly consented to the agreement, the Union, as Charging Party in the case, opposes the settlement. Further, the statement's lack of detail is essentially unavailing for the purposes it is presented. An analysis of the remaining *Independent Stave* factors weigh against the General Counsel's Motion to Remand and the Regional Director's approval of the settlement, despite Ingram's apparent consent to waive reinstatement.

With respect to the second factor, the Respondent was found by the ALJ to have committed serious violations under Sections 8(a)(1) and (3) of the Act. These included discharging Ingram because of her union activity and status as a key union organizer and supporter, threatening employees with job loss if they became involved in the union and instructing employees not to talk to other employees about the union or to have any communication with or about the union while they were "on the clock." Such unlawful conduct

is the hallmark of "nip-in-the-bud" cases, which inherently affect employees' Section 7 rights. *See*, *e.g.*, *Eddyleon Chocolate Co.*, 301 NLRB 887, 891 (1991)(unlawful discharges affect remaining employees who reasonably fear that they too will lose employment if union activity persists.).

The General Counsel's Memorandum GC-07 outlined the Agency's commitment to seek Section 10(j) injunctive relief for unlawful discharges in organizing campaigns, setting forth the two (2) basic reasons for seeking such relief: (1) that an unremedied discharge sends to other employees a message that they also could risk retaliation by exercising Section 7 rights; and (2) that the continued absence from the workspace of unlawfully discharged union leaders not only continues the negative message from the discharges, but, also, the remaining employees are deprived of the leadership of active and vocal union supporters.

The General Counsel's Memorandum GC-11-01 similarly emphasized the importance of protecting employee free choice with regard to unionization by instructing regional offices to seek additional remedies in conjunction with Section 10(j) relief. As the Acting General Counsel notes, in so-called "nip-in-the-bud" cases other serious unfair labor practices often occur in addition to the unlawful discharge. The effect is a serious impact on employee free choice as these cases inhibit employees from engaging in union activity and dry up channels of communication between employees. Both GC 10-07 and GC 11-01 propound the importance of such remedies during organizing campaigns to remove the impact of the unlawful discharge and the unlawful restriction on employee free choice.

A reasonable settlement should remedy Respondent's unlawful conduct directed at the entire workforce, in addition to Ingram and Warnick. See, e.g., *Flint Iceland Arenas*, 325 NLRB

318, 319 (1998) ("But here the alleged unlawful conduct was directed at the entire workforce which the Union was seeking to organize, and the settlement remedies virtually not injury to employee rights other than providing payments to three employees..."). The instant settlement would vitiate the General Counsel's policies and the purpose of the Act with respect to protecting employee free choice.

Further, the risks involved in litigation are minimal at this stage as the ALJ has issued his Decision and Recommended Order and the Regional Office has expended considerable time in federal court to obtain Section 10(j) relief. In addition, the Union has not received notice that Respondent filed exceptions to the ALJ's decision or of an additional extension by which Respondent could do so beyond the September 21, 2012 deadline.

Rather than advancing the policies of the Act, the settlement would vitiate those policies by undermining the rights of the remaining employees, the Charging Party, and Ingram. The remaining workforce will justifiably fear similar retaliation, discrimination, threats, and other illegal conduct by Respondent. The Charging Party's ability to communicate with employees will be entirely severed under the settlement agreement. Respondent seeks to take advantage the financial distress Ingram now faces, which is initially the result of Respondent's unlawful discharge, to avoid future communication among employees about and with the Union and to obliterate the Union's organizing campaign.

The settlement would also wholly fail to accomplish the Act's objective of stabilizing or promoting relations between the Union and Respondent. By waiving a key union supporter and organizer's reinstatement, the Respondent will prevail in destroying the Union's ability to communicate with employees. Indeed, the concept of labor-management cooperation is

incompatible with this case as the settlement would *prevent* employee choice as to the creation of a labor-management relationship. *See Flint Iceland Arenas*, 325 NLRB 318, 319 fn 5 (1998).

III. CONCLUSION

The Union respectfully requests that the Board deny the General Counsel's Motion to Remand the Case. The settlement agreement was brokered by the Respondent and the Regional Office after an ALJ decision issued finding Respondent committed several violations of the Act, including the unlawful discharge of the key union activist and interfering with employee free choice and the Union's organizing campaign. Despite the likelihood of success in a pending motion for Section 10(j) relief in federal court in the near future, the Regional Office seeks to approve a settlement that obstructs, rather than furthers, the policies of the Act. By requiring Ingram to waive reinstatement and, thus, sever all communication between the remaining workforce, the Union, and Ingram, Respondent will ultimately be rewarded for its conduct determined by the ALJ to violate Federal labor law. For these reasons, the Union opposes the General Counsel's Motion to Remand the Case and requests that the Board retain jurisdiction of the matter for processing.

Dated at Cincinnati, Ohio this 28th day of September 2012.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2012, I electronically filing the foregoing Opposition To Acting General Counsel's Motion To Remand Case with the Executive Secretary of the Board using the Agency's e-filing system and served copies of it by e-mail upon:

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